(7)

No. 90-79

Supreme Court, U.S.
FILED
DEC 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD B. KAY, PETITIONER

v.

BREMER EHRLER AND THE
KENTUCKY BOARD OF ELECTIONS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a lawyer who litigates an action pro se is eligible for an award of attorney's fees under 42 U.S.C. 1988.

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INTEREST OF THE UNITED STATES

This case presents the question whether a lawyer who litigates an action pro se is eligible for an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, 42 U.S.C. 1988.[1] The Court's resolution

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[1] Section 1988 provides in part:

> In in any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

of this question is likely to affect the liability of the United States for attorney's fees under several important federal fee-shifting statutes, including the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, the Freedom of Information Act (FOIA), 5 U.S.C. 552(a)(4)(E), and the Privacy Act of 1974, 5 U.S.C. 552a(g)(3)(B). See, *e.g.*, *Poythress* v. *Kessler*, 475 U.S. 1129, 1130 (1986) (Burger, C.J., joined by White, J., dissenting from the denial of certiorari) ("[T]he award of fees under § 1988 and under [FOIA] have much in common."). See also Pet. Br. 19 n.8 ("The interpretation of section 1988 could have farreaching implications for many other fee-shifting statutes * * *.").

The United States and federal agencies also are subject to attorney's fee awards under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k). Title VII and Section 1988 "authorize fee awards in identical language, and Congress acknowledged the close connection between the two statutes when it approved § 1988." *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 758 n.5 (1980) (citing S. Rep. No. 1011, 94th Cong., 2d Sess. 2-6 (1976); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 5-8 (1976)). In addition, a claim against the government for attorney's fees under Section 1988 is now before a court of appeals. *Lawrence* v. *Bowsher*, No. 84-5443 (D.C. Cir., argued Sept. 14, 1990).

The United States has a substantial interest in the interpretation and application of the federal civil rights laws, including Section 1988. Because we believe that fee awards to pro se litigants, including pro se lawyers, are inconsistent with the language and goals of Section 1988, we agree with the court of appeals that petitioner is not eligible for an award of attorney's fees in this case.

STATEMENT

1. Petitioner is licensed to practice law in the State of Florida.[2] He has sought the nomination of the Democratic Party for President of the United States—unsuccessfully—on several occasions. In December 1987, petitioner wrote to the Secretary of State of Kentucky requesting that his name be placed on the ballot in Kentucky's 1988 presidential primary. The Secretary referred petitioner's request to the Kentucky Board of Elections. The Board denied the request because it concluded that petitioner was not a "generally advocated and nationally recognized" candidate. Pet. App. 3a; see Ky. Rev. Stat. Ann. § 118.581 (1982 & 1989 Supp.)

2. Petitioner, proceeding pro se, brought an action in the United States District Court for the Eastern District of Kentucky, asserting that Kentucky's statutes governing presidential primaries violated his constitutional rights. Petitioner sought a declaration that two of the Kentucky statutes are unconstitutional, an injunction requiring the State to place his name on the primary ballot, and an order directing the State to refund the $1,000 "candidates' deposit" required by Kentucky law. See Ky. Rev. Stat. Ann. § 118.611 (1982 & 1989 Supp.). In an earlier pro se action arising from petitioner's efforts to obtain a

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[2] Although not reflected in the record of this case, it is a matter of public record that petitioner is not a member of the Kentucky Bar or the Bar of the United States District Court for the Eastern District of Kentucky, the court in which this case was litigated. Nor did petitioner file a motion for admission *pro hac vice* in this action. Accordingly, as discussed more fully below, see note 6, *infra*, petitioner's status before the trial court was no different from that of a non-attorney pro se litigant.

place on the Kentucky presidential primary ballot in 1980, the court held unconstitutional a prior Kentucky statute with language identical to that of Ky. Rev. Stat. Ann. § 118.581. See *Kay* v. *Mills*, 490 F. Supp. 844 (E.D. Ky. 1980). Pet. App. 1a-3a.

Two days after petitioner filed his action, the newly installed Secretary of State of Kentucky notified petitioner that the Board of Elections had agreed to place his name on the primary ballot. Although this rendered his request for injunctive relief moot, petitioner proceeded with the remainder of his action. Following discovery, both sides moved for summary judgment. Pet. App. 2a.

3. The district court referred the matter to a magistrate, who recommended that the district court grant petitioner most of the relief he sought on the merits. The magistrate agreed with petitioner that the case was not moot. Pet. App. 20a-21a. On the merits, the magistrate concluded that the statutory provision requiring primary candidates to be "generally advocated and nationally recognized" is unconstitutionally vague, and rejected the State's argument that the constitutional problem was cured by the Election Board's limiting interpretation of the statutory language. *Id.* at 21a-23a. The magistrate also concluded that requiring primary candidates to forfeit a $1,000 deposit if the candidate fails to receive at least 3% of the primary vote places an unconstitutional burden on unpopular candidates in violation of the Equal Protection Clause. *Id.* at 23a-26a. The magistrate agreed with respondents, however, that petitioner's state law claims should be dismissed for lack of subject matter jurisdiction. *Id.* at 26a-27a.

The magistrate recommended that petitioner be awarded his litigation costs, but not an attorney's

fee. Pet. App. 27a-28a. The magistrate noted that the court of appeals had held that pro se lawyers are not entitled to attorney's fees under FOIA, *Falcone* v. *IRS*, 714 F.2d 646 (6th Cir. 1983), cert. denied, 466 U.S. 908 (1984), and concluded that the court of appeals was unlikely to reach a different result under Section 1988.

The district court held that "[t]he Magistrate's analysis and conclusion on [the attorney's fee] issue is correct in all respects, and the court hereby adopts same." Pet. App. 16a.

4. The court of appeals affirmed. Pet. App. 1a-11a. It observed that most courts of appeals have held that Section 1988 does not authorize attorney's fee awards to pro se non-lawyers. The courts have reasoned that Section 1988 " 'presupposes a relationship of attorney and client' that does not exist when the plaintiff proceeds *pro se*." Pet. App. 5a (quoting *Davis* v. *Parratt*, 608 F.2d 717, 718 (8th Cir. 1979) (per curiam)). The court of appeals agreed that "the 'plain language' of a statutory provision for attorney's fees assumes a paying relationship between an attorney and a client." Pet. App. 8a. Although the court recognized that two courts of appeals and two district courts have held that pro se lawyers—unlike other pro se litigants—may recover fees under Section 1988, the court also looked to decisions under other federal fee-shifting statutes denying fees to lawyers who litigate pro se.

In particular, the court noted that it had held in *Falcone* v. *IRS*, *supra*, that pro se lawyers are not eligible for attorney's fees under FOIA. The court observed that one purpose of fee-shifting provisions is "to encourage potential claimants to seek legal advice before commencing litigation," because "reten-

tion of legal counsel might help to prevent unnecessary litigation." 714 F.2d at 647. When an attorney represents himself, however, "this filtering does not occur." Pet. App. 7a. The court also said in *Falcone* that allowing pro se lawyers to recover attorney's fees might lead to "the establishment of a 'cottage industry' of inactive lawyers who would support themselves on statutory fee awards for self-generated litigation." *Ibid.* The court in *Falcone* concluded that, in enacting FOIA, Congress did not intend to "subsidize attorneys without clients." 714 F.2d at 648. Instead, "[b]oth a client and an attorney are necessary ingredients for an award of fees." *Ibid.*

The court of appeals found that its reasoning under FOIA applies in the context of Section 1988 as well. Here, as in *Falcone*, the court concluded that the plain language of the statute precludes an award of attorney's fees to pro se lawyers. In addition, a pro se litigant's "opportunity costs" are not the kind of costs that can be recovered under Section 1988. Even "[a]ssuming that [petitioner] spent hours prosecuting this case that he could have billed to clients, he has only failed to add to the wealth of his private practice. He has not incurred any expenses for legal representation, and, therefore, he cannot recover under section 1988." Pet. App. 8a. In addition, a pro se lawyer lacks the objectivity necessary to evaluate the merits of potential civil rights claims. Consequently, encouraging pro se litigation would frustrate one of the purposes of the statute.

Judge Jones dissented. Pet. App. 9a-11a. In his view, *Falcone* recognized that allowing pro se litigants to recover their opportunity costs would raise difficult problems of proof, but did not foreclose such recoveries. Judge Jones concluded that Section 1988,

unlike FOIA, is intended to encourage lawyers "to search for violations of constitutional and statutory rights and to vindicate those rights." Pet. App. 10a (quoting *Duncan* v. *Poythress*, 777 F.2d 1508, 1515 (11th Cir. 1985), cert. denied, 475 U.S. 1129 (1986)). Because Section 1988 "not only relieves the burden of litigation, but also rewards successful litigants for vindicating a constitutional right," Pet. App. 10a, Judge Jones said that concerns about objectivity and a possible "cottage industry of fee-generating lawyers" are not as serious as under FOIA. *Ibid.*

SUMMARY OF ARGUMENT

1. The plain language of Section 1988 precludes awards of attorney's fees to pro se lawyers. As petitioner concedes (Pet. Br. 9-10 n.4), the language of Section 1988 requires the involvement of a "licensed attorney." The ordinary meaning of "attorney" is a person who is both (1) licensed to practice law and (2) acting as the agent or representative of a client. It is a basic principle of agency law that one cannot be one's own agent. Consequently, a pro se lawyer cannot function as his own attorney, any more than he can be his own friend.

The statutory phrase "attorney's fee" reinforces the ordinary meaning of "attorney." A pro se lawyer cannot provide himself with a "fee" in the sense of compensation for service. Petitioner rests much of his case on the argument that (1) "organizational plaintiffs" do not pay legal fees, (2) Congress intended to allow "organizational plaintiffs" to recover attorney's fees under Section 1988, and (3) organizational plaintiffs are indistinguishable from pro se lawyers. This argument, which rests on legislative

history rather than statutory language, is unconvincing. Although petitioner is correct that organizational plaintiffs (as well as lawyers representing clients *pro bono publico*) have been allowed to recover attorney's fees under Section 1988, those cases are not the same as that of a pro se lawyer. An organization can act only through its agents. Thus, litigation on behalf of an organizational plaintiff always involves an attorney-client relationship. In contrast, pro se litigation never involves such a relationship. Petitioner's practical objections to the requirement that prevailing parties show the existence of an attorney-client relationship as a prerequisite to a fee award are not well taken.

In addition, the "opportunity costs" of a pro se litigant are not "a part of costs" in the usual sense of that phrase. Nor is there any meaningful distinction between the "opportunity costs" of pro se lawyers and the opportunity costs of other pro se litigants who are not permitted to recover attorney's fees.

2. a. Although the Court need not resort to legislative history to construe clear statutory language, the legislative history of Section 1988 contains numerous statements indicating that Congress used "attorney's fee" in the usual sense of a lawyer's fee for representing a client. Petitioner ignores these statements and focuses instead on the status of organizational plaintiffs. Because organizational plaintiffs act only through their agents, there is no basis for petitioner's contention that Congress must have intended to treat pro se lawyers like organizations.

b. Awarding attorney's fees to pro se lawyers would frustrate rather than further the goals of Section 1988. In enacting Section 1988, Congress plainly did not intend to encourage pro se litigation;

there is no reason to conclude that Congress intended to encourage pro se litigation by lawyers. The familiar adage that "a lawyer who represents himself has a fool for a client" is based on long experience with pro se litigation. A pro se lawyer lacks professional detachment and objectivity. In addition, it is unlikely that Congress meant to encourage lawyers to entangle themselves in the ethical problems that may arise from pro se litigation.

There is little risk that denying fees to pro se lawyers will restrict their access to the judicial process or inhibit the filing of meritorious civil rights actions. The rule adopted by the court of appeals simply places lawyers on the same footing as all other citizens; lawyers are at least as capable of obtaining legal representation as other plaintiffs. In addition, a rule that favors pro se lawyers over all other pro se litigants has at least the appearance of unfairness. All pro se litigants expend time and energy on litigation; all "prevailing parties" have achieved success in the litigation. Public respect for lawyers and judges would not be enhanced by a rule that appears to favor the economic welfare of lawyers over other litigants.

ARGUMENT

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, does not authorize awards of attorney's fees to pro se litigants, including pro se lawyers. The courts of appeals have held, in an overwhelming majority of cases, that non-lawyer pro se litigants are not eligible for attorney's fee awards under Section 1988 or other federal fee-shifting statutes.[3] Petitioner himself concedes that construing Section 1988 to permit pro se non-lawyers to recover attorney's fees would "push the [statutory] language too far." Pet. Br. 9-10 n.4. Although petitioner is correct on this point, he is incorrect in contending that a pro se litigant's eligibility for an attorney's fee award depends solely on the party's qualifications to practice law. The language of the statute, its legislative history, and the policies underlying Section 1988 point to the conclusion that all pro se litigants, whether lawyers or not, are ineligible for awards of attorney's fees.[4]

[3] See *Naekel* v. *Dep't of Transportation*, 845 F.2d 976, 978-981 (Fed. Cir. 1988) (EAJA); *Gonzalez* v. *Kangas*, 814 F.2d 1411, 1411-1412 (9th Cir. 1987) (Section 1988); *Clarkson* v. *IRS*, 811 F.2d 1396, 1397 n.2 (11th Cir.) (Privacy Act), cert. denied, 481 U.S. 1031 (1987); *Merrell* v. *Block*, 809 F.2d 639, 641-642 (9th Cir. 1987) (EAJA); *Crooker* v. *EPA*, 763 F.2d 16, 17 (1st Cir. 1985) (EAJA); *DeBold* v. *Stimson*, 735 F.2d 1037, 1041-1043 (7th Cir. 1984) (FOIA); *Redding* v. *Fairman*, 717 F.2d 1105, 1120 (7th Cir. 1983) (Section 1988), cert. denied, 465 U.S. 1025 (1984); *Wolfel* v. *United States*, 711 F.2d 66, 67-68 (6th Cir. 1983) (FOIA); *Turman* v. *Tuttle*, 711 F.2d 148 (10th Cir. 1983) (Section 1988); *Pitts* v. *Vaughn*, 679 F.2d 311, 312-313 (3d Cir. 1982) (Section 1988); *Wright* v. *Crowell*, 674 F.2d 521, 522 (6th Cir. 1982) (per curiam) (Section 1988); *Cunningham* v. *FBI*, 664 F.2d 383, 384-387 (3d Cir. 1981) (FOIA); *Barrett* v. *Bureau of Customs*, 651 F.2d 1087, 1088-1090 (5th Cir. 1981) (FOIA), cert. denied, 455 U.S. 950 (1982); *Cofield* v. *City of Atlanta*, 648 F.2d 986, 987-988 (5th Cir. 1981) (Section 1988); *Lovell* v. *Snow*, 637 F.2d 170, 171 (1st Cir. 1981) (Section 1988); *Crooker* v. *United States Dep't of Justice*, 632 F.2d 916, 920-922 (1st Cir. 1980) (FOIA); *Davis* v. *Parratt*, 608 F.2d 717, 718 (8th Cir. 1979) (per curiam) (Section 1988); *Burke* v. *United States Dep't of Justice*, 559 F.2d 1182 (10th Cir. 1977), aff'g 432 F. Supp. 251, 253 (D. Kan. 1976). The Second Circuit has denied fees to pro se non-lawyers, but has left open the possibility that such litigants might be entitled to recover fees if the litigation caused them to forgo income. *Kuzma* v. *Postal Service*, 725 F.2d 16, 17, cert. denied, 469 U.S. 831 (1984). Only the D.C. Circuit has allowed fees to pro se non-lawyers. *Cox* v. *United States Dep't of Justice*, 601 F.2d 1, 5-6 (1979) (FOIA). And even the D.C. Circuit has not extended this ruling to all fee-shifting provisions. See *Jones* v. *Lujan*, 883 F.2d 1031, 1035 (1989) ("There can be no real doubt that EAJA requires that the attorney be trained in the *law*.").

[4] Petitioner's assertion (Pet. Br. 9) that "the great weight of authority" supports attorney's fee awards to pro se lawyers is an overstatement. Three courts of appeals have held that pro se lawyers are not eligible for fees under federal fee-shifting statutes. *Aronson* v. *HUD*, 866 F.2d 1, 4-6 (1st Cir. 1989) (FOIA); *Falcone* v. *IRS*, 714 F.2d 646, 647-648 (6th Cir. 1983) (FOIA), cert. denied, 466 U.S. 908 (1984); *White* v. *Arlen Realty & Dev. Corp.*, 614 F.2d 387, 388-389 (4th Cir.) (Truth in Lending Act), cert. denied, 447 U.S. 923 (1980). Four court of appeals have held to the contrary. *Duncan* v. *Poythress*, 777 F.2d 1508 (11th Cir. 1985) (en banc) (Section 1988), cert. denied, 475 U.S. 1129 (1986); *Cazalas* v. *United States Dep't of Justice*, 709 F.2d 1051 (5th Cir. 1983) (FOIA); *Ellis* v. *Cassidy*, 625 F.2d 227, 230-231 (9th Cir. 1980) (Section 1988); *Cuneo* v. *Rumsfeld*, 553 F.2d 1360, 1366 (D.C. Cir. 1977) (FOIA). See also *Jones* v. *Lujan*, 883 F.2d 1031 (D.C. Cir. 1989) (EAJA). The Ninth Circuit's position is not entirely clear, however, because in *Ellis* v. *Cassidy* "the *pro se* lawyers were defendants, not plain-

I. THE LANGUAGE OF SECTION 1988 PRECLUDES AWARDS OF ATTORNEY'S FEES TO PRO SE LITIGANTS, INCLUDING PRO SE LAWYERS

"'In determining the scope of a statute, we look first to its language,' giving the 'words used' their 'ordinary meaning.'" *Moskal* v. *United States*, No. 89-964 (Dec. 3, 1990), slip op. 4 (quoting *United States* v. *Turkette*, 452 U.S. 576, 580 (1981); *Richards* v. *United States*, 369 U.S. 1, 9 (1962)). The relevant language of Section 1988 provides that, in an action or proceeding under specified civil rights statutes, the court may award a prevailing party "a reasonable attorney's fee as part of the costs" of the action. See note 1, *supra*. An award of attorney's fees to a lawyer litigating pro se is inconsistent with the ordinary meaning of "attorney," "attorney's fee," and "costs." [5]

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tiffs" and "[t]his weighed heavily in the court's decision awarding fees." *Aronson* v. *HUD*, 866 F.2d at 5.

The federal trial courts are also divided. Compare *Frisch* v. *Commissioner*, 87 T.C. 838, 841-846 (1986) (no fees under 26 U.S.C. 1430(c)(1)(A)) and *Lawrence* v. *Staats*, 586 F. Supp. 1375 (D.D.C. 1984) (no fees under Section 1988) with *Lanasa* v. *City of New Orleans*, 619 F. Supp. 39 (E.D. La. 1985) (fees under Section 1988) and *Rybicki* v. *State Bd. of Elections*, 584 F. Supp. 849 (N.D. Ill. 1984) (same).

[5] The leading opinion holding that pro se lawyers are eligible for fees under Section 1988 simply asserts, without discussion, that "the plain language of section 1988 does not preclude an award of fees to a lawyer representing herself." *Duncan* v. *Poythress*, 777 F.2d at 1511. For the reasons stated below, this is not so. In any event, the Eleventh Circuit—unlike petitioner—candidly recognized that the language of Section 1988 does not require fees awards to pro se lawyers, but at most permits such awards.

A. The Ordinary Meaning of "Attorney" Does Not Describe a Pro Se Lawyer

Petitioner concedes that the plain language of Section 1988 requires the involvement of a "licensed attorney." Pet. Br. 9-10 n.4. Petitioner then asserts, without argument, that he is a licensed attorney, and that therefore the language of the statute requires that he be awarded attorney's fees.[6] Pet. Br. 10. Petitioner's conclusion does not follow from his premise. The fact that a pro se litigant is licensed to practice law does not imply that he is his own "attorney." On

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[6] The courts below held that pro se lawyers are not entitled to attorney's fees, and therefore had no occasion to address the sufficiency of petitioner's legal qualifications. In fact, petitioner is not admitted to the Kentucky Bar or the Bar of the United States District Court for the Eastern District of Kentucky. Nor did he seek to be admitted to practice *pro hac vice* in this case. See note 2, *supra*. These facts were not noted in the petition for certiorari. Although the matter was not raised in Kentucky's brief in opposition to the petition for certiorari, and so may be considered waived under Rule 15.1 of the Rules of this Court, the fact that a lawyer is not admitted to the bar of a federal district court is a matter of public record of which this Court may take judicial notice. See *National Leasing Corp.* v. *Williams*, 80 F.R.D. 416, 418 (W.D. Pa. 1978) (taking judicial notice that lawyer is a member of district court bar). Because petitioner was not entitled to practice law in the district court, he is not eligible for an award of attorney's fees in any event. Even if pro se lawyers are entitled to attorney's fees under Section 1988, it is not sufficient that the pro se litigant is licensed to practice law in another jurisdiction (or was graduated from law school, or has some legal training). The litigant must be admitted to practice in the court where the action is brought. See *Hannon* v. *Security Nat'l Bank*, 537 F.2d 327 (9th Cir. 1976) (pro se law school graduate not yet licensed to practice law treated as non-attorney). See also *Jones* v. *Lujan*, 883 F.2d at 1037 (Silberman, J., concurring).

the contrary, the word "attorney" ordinarily refers to a person who is (1) licensed to practice law, and (2) acts as the agent or representative of clients. The ordinary meaning of "attorney" comprises both of these elements. See, *e.g.*, *Savings Bank* v. *Ward*, 100 U.S. 195, 199 (1879) ("Persons acting professionally in legal formalities, negotiations or proceedings *by the warrant or authority of their clients* may be regarded as attorneys-at-law within the meaning of that designation as used in this country.") (emphasis added). Indeed, the second element predates the first. "Attorney" originally meant simply a substitute or agent, and this original meaning survives in phrases such as "power of attorney" and "attorney in fact."[7] Judge Roney has observed that

> without exception [two dozen dictionaries] define the word "attorney" in terms of one who acts for *another*, someone who is employed as an agent to represent *another*, someone who acts at the appointment of *another*.

Duncan v. *Poythress*, 777 F.2d at 1517-1518 (dissenting opinion).[8]

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[7] "Attorney" is derived from the Old French word "atourné," which meant "one appointed or constituted," and is related to the word "attorn," which means "[t]o turn over to another; to assign." 1 *Oxford English Dictionary* 553 (1933).

[8] See, *e.g.*, 1 *Oxford English Dictionary* 553 (1933) ("attorney" is "[o]ne appointed or ordained to act for another"); *Webster's Third New International Dictionary* 141 (1986) ("one who is legally appointed by another to transact business for him; *specif*: a legal agent qualified to act for suitors and defendants in legal proceedings"); *Webster's New International Dictionary, Second Edition* 179 (1950) (same). *Black's Law Dictionary* 128 (6th ed. 1990), after stating that "[i]n the most general sense ['attorney'] denotes an agent or substitute," and "["i]n its most common usage * * * means 'attorney at law', 'lawyer' or 'counselor at law,'" adds that "'attorney' includes a party prosecuting or defending an action in person." In support of the latter statement, the dictionary cites Section 105(c) of the New York Civil Practice Law and Rules (McKinney 1990). The fact that a State has chosen to enact a statute departing from the ordinary meaning of "attorney" does not alter the ordinary meaning of that word, and may in fact reinforce it.

It is a basic principle of agency law that one cannot be one's own agent. See Restatement (Second) of Agency § 1 (1958) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another * * *."); 2A C.J.S. *Agency* § 27, at 592 (1972) ("There is no agency unless one is acting for and in behalf of another, since a man cannot be the agent himself."). Consequently, "the terms 'pro se' and 'attorney' are mutually exclusive." *Duncan*, 777 F.2d at 1518 (Roney, J., dissenting). A pro se litigant, whether trained in the law or not, cannot be his own "attorney," any more than he can be his own friend.[9] In short, "Congress did not use 'attorney' to mean 'something other than a lawyer,' * * *. Instead, Congress meant something *more* than a lawyer; it meant a lawyer acting as a legal repre-

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[9] In the Act of Feb. 26, 1853, ch. 80, 10 Stat. 161, after listing fees that could be taxed by the federal courts, Congress provided that "this act shall not be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving *from their clients* * * * compensation for their services * * *." (Emphasis added). In *Gorse* v. *Parker*, 36 F. 840, 841 (N.D. Ill. 1888), the court said that "where a party is obliged by reason of his unfamiliarity with proceedings in courts to employ an attorney or solicitor, the law gives him this fee to aid in compensating his attorney; but if a party is not obliged to resort to a lawyer for assistance, then the allowance is not recoverable."

sentative or attorney for another." *Jones* v. *Lujan*, 883 F.2d at 1037 (Silberman, J., concurring in the result).[10]

B. The Ordinary Meaning of "Attorney's Fee" Does Not Apply to Pro Se Litigation

The statutory phrase "attorney's fee" reinforces the conclusion that Congress used "attorney" in the usual sense of a lawyer acting as the representative of a client. Of course a pro se lawyer does not actually charge himself a "fee" in the ordinary sense of "recompense for an official or professional service." *Black's Law Dictionary* 614 (6th ed. 1990). And even if he did, this would not alter the reality that lawyer and client are one and the same person. Cf. *Handfield* v. *Commissioner*, 23 T.C. 633, 638-639 (1955) (sole proprietor may not deduct as business expense the salary he "paid" himself).

Petitioner rests much of his argument on the contention that "organizational litigants" (such as the plaintiffs in *Alyeska Pipeline Serv. Corp.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975)), do not pay legal

[10] Consideration of other areas of law further demonstrates that a lawyer who undertakes to represent himself is not acting as his own "attorney." For example, a pro se lawyer could not successfully claim the attorney-client privilege on the ground that he is licensed to practice law and "communicated" with himself for the purpose of obtaining his own legal advice. Similarly, this Court has held that a nonlawyer criminal defendant who elects to proceed pro se is not entitled to pursue a claim for ineffective assistance of counsel. *McCaskle* v. *Wiggins*, 465 U.S. 168, 177-178 n.8 (1984). The result would be no different if the defendant were licensed to practice law. Nor could a pro se lawyer with malpractice coverage sue himself for malpractice and recover from his insurance carrier.

fees, and that organizations are "indistinguishable from pro se attorneys." Pet. Br. 12-18. It is true that public service organizations have been permitted to collect fees under Section 1988 for work performed by in-house lawyers. See, *e.g.*, *Blum* v. *Stenson*, 465 U.S. 886, 894 (1984). And law firms have been allowed to recover fees for work undertaken *pro bono publico*. See, *e.g.*, *Cornella* v. *Schweiker*, 728 F.2d 978, 986-987 (8th Cir. 1984); *Rodriguez* v. *Taylor*, 569 F.2d 1231, 1244-1246 (3d Cir. 1977).

As an initial matter, petitioner does not attempt to rest his argument about the status of organizational plaintiffs on the plain meaning of "attorney's fee," but rather relies on legislative history indicating that Congress intended to authorize awards to such plaintiffs.[11] Consequently, petitioner's argument has force only if pro se lawyers and organizational plaintiffs truly are indistinguishable. But petitioner's assertion to that effect is simply false. An organization, unlike an individual, acts only through human agents. See *Upjohn Co.* v. *United States*, 449 U.S. 383, 390 (1981) (corporation "an inanimate entity"). Thus, an organization cannot proceed "pro se." Litigation on behalf of an "organizational plaintiff," unlike litigation by a pro se lawyer, necessarily involves an agency relationship between an attorney and the or-

[11] See *Blanchard* v. *Bergeron*, 489 U.S. 87, 91-92 & n.6 (1989) (discussing legislative history). In particular, the Senate Report stated that "the appropriate standards" were "correctly applied" in *Davis* v. *County of Los Angeles*, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. 1974). S. Rep. No. 1011, *supra*, at 6. In *Davis*, "the court permitted a fee award to counsel in a public interest firm which otherwise would have been entitled to no fee." 489 U.S. at 93.

ganizational client.[12] In addition, in-house lawyers generally are compensated for their services, although their compensation may take the form of a salary rather than an hourly fee. Consequently, petitioner's contention that this case cannot be distinguished from cases involving organizational plaintiffs is unpersuasive.

Petitioner, having asserted that organizational litigants are "indistinguishable" from pro se lawyers (Pet. Br. 12), contradicts his assertion by conceding (*id.* at 27) that the existence of an attorney-client relationship "could serve to distinguish pro se attorneys from organizational litigants." Petitioner attempts to minimize the consequences of this (necessary) concession by suggesting that such a distinction "would enmesh the courts in a case-by-case assessment of the attorney-client relationship, lead to inappropriate line-drawing, and invite evasion." *Ibid.* Petitioner's concerns are exaggerated.

First, there is no basis for the suggestion that courts are ill-suited to determine the existence *vel non* of an attorney-client relationship, or that this is a particularly difficult judicial inquiry. Courts routinely decide this question in a variety of legal contexts—for example, in determining whether a lawyer is subject to the obligations owed to clients, see, *e.g.*, *Telectronics Proprietary, Ltd.* v. *Medtronic, Inc.*, 836 F.2d 1332, 1336-1339 (Fed. Cir. 1988); whether the attorney-client privilege is applicable, see, *e.g.*, *In re Grand Jury Subpoenas*, 803 F.2d 493, 499 (9th Cir. 1986); and whether notice to an attorney binds a particular client, cf. *Irwin* v. *Veterans Administration*, No. 89-5867 (Dec. 3, 1990), slip op. 3. Second, requiring an

[12] Similarly, a lawyer who litigates *pro bono publico* nevertheless functions as the agent for a client.

attorney-client relationship as a prerequisite for an award of attorney's fees is appropriate and consistent with the ordinary meaning of "attorney." Nor do we agree that requiring plaintiffs to show an attorney-client relationship as a prerequisite to a fee award would invite evasion. Lawyers representing bona fide organizations are eligible for fee awards, but organizations that are no more than the lawyer's alter ego do not transform a pro se lawyer into an attorney.

C. The Ordinary Meaning of "Costs" Does Not Include the "Opportunity Costs" of Pro Se Litigants

Section 1988 provides for an award of attorney's fees "as a part of costs." The time expended by pro se litigants on the litigation is not a part of their "costs" in the usual sense of that word.[13] It is true that a pro se lawyer, like other pro se litigants, may forgo other opportunities to earn income. But there is no indication that Congress intended to use the word "costs" to include "opportunity costs." Moreover, as discussed more fully below, see p. 28, *infra*, all pro se litigants incur "opportunity costs." The fact that pro se lawyers incur such costs does not distinguish them from other pro se litigants who petitioner concedes are excluded from attorney's fee awards by the plain language of the statute.

In sum, the plain language of Section 1988 providing for "an award of attorney's fees, as a part of costs" does not authorize a fee award to a pro se litigant, even if the litigant is licensed to practice law. The pro se lawyer is not an "attorney" in the

[13] Of course, a pro se litigant is entitled to recover filing fees and other recognized costs, and petitioner was awarded such costs in this case. See Pet. App. 16a-17a.

proceeding in the usual sense of that term, nor does he incur "attorney's fees" as "costs." Because petitioner's position is inconsistent with the plain meaning of the statute, his reliance on *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), for the proposition that Section 1988 must be construed broadly in favor of fee awards (see Pet. Br. 7, 11, 12) is misplaced. The language of Section 1988, even construed broadly in favor of prevailing parties, simply does not support the result petitioner argues for in this case.[14]

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[14] The court of appeals' reading of Section 1988 is reinforced by the language of 28 U.S.C. 1924, which provides:

> Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed.

The language of Section 1924 indicates that "the party claiming any item of cost" and "his duly authorized attorney or agent" are not the same person, that costs must have been "incurred," and that fees must have been "charged." None of these conditions is met in the case of a pro se lawyer.

Similarly, 28 U.S.C. 2412(a), which governs awards of costs against the United States, provides that "[a] judgment for costs against the United States shall * * * be limited to reimbursing * * * the prevailing party for the costs incurred by such party in the litigation."

II. THE LEGISLATIVE HISTORY OF SECTION 1988 INDICATES THAT CONGRESS INTENDED TO LIMIT ATTORNEY'S FEE AWARDS TO ATTORNEYS WITH CLIENTS

"'Absent a clearly expressed legislative intention to the contrary,' the words of the statute are conclusive." *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 310 (1989) (quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). This is not one of the "rare cases [in which] the literal application of the statute will produce a result demonstrably at odds with the intentions of its drafters." *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (quoting *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). On the contrary, the legislative history confirms that Congress intended to use the phrase "attorney's fee" in its ordinary sense, as a payment by a client to an attorney.

A. In Enacting Section 1988, Congress Intended to Authorize Fee Awards to Parties Represented by Attorneys

The legislative history contains several indications that Congress intended that the phrase "attorney's fee" refer to the traditional attorney-client relationship. The Senate Report states:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, * * * then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976). The Senate Report also states that attorney's fee awards

under the new legislation should be "adequate to attract competent counsel, but * * * not produce windfalls to attorneys." *Id.* at 6.

The House Report discloses a similar intent:

> Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, [the bill] is designed to give such persons effective access to the judicial process * * *.

H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976). In addition, one of the factors that Congress intended to be applied in determining the amount of the fee, see *Hensley* v. *Eckerhart*, 461 U.S. 424, 429-430 (1983), concerns "the nature and length of the professional relationship with the client," *id.* at 430 n.3.

The debates on the bill that became Section 1988 provide further evidence that Congress intended to provide fees to clients who hire attorneys. Senator Tunney, the sponsor of the legislation, stated that its purpose and effect was "to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate their rights under our civil right statutes." 121 Cong. Rec. S14,975 (daily ed. Aug. 1, 1975).[15] Senator Bumpers agreed that "the inability

[15] The debates are *reprinted in* Staff of Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess., *Civil Rights Attorney's Fee's Awards Act of 1976* (Comm. Print 1976) [hereinafter *Sourcebook*].

Awards of attorney's fees to pro se lawyers are not a "traditional remedy." Nowhere in this Court's lengthy survey of the history of fee awards in the United States in *Alyeska Pipeline Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975), is there even a suggestion that pro se litigants, whether or not trained in the law, traditionally have been awarded attorney's fees. Although a small number of States have awarded fees to pro se lawyers (see Pet. Br. 13 n.6 (citing cases)), others have refused to award such fees. See *Connor* v. *Cal-Az Properties, Inc.*, 137 Ariz. 53, 668 P.2d 896 (Ct. App. 1983) (denying attorney's fee to pro se lawyer); *Hamer* v. *Lentz*, 547 N.E.2d 191 (Ill. 1989) (same); *Cheney* v. *Ricks*, 168 Ill. 533, 48 N.E. 75 (1897) (same); *Westenberger* v. *Bernard*, 160 So.2d 312 (La. Ct. App. 1964) (same); *Vanhooser* v. *Cunningham*, 24 Tenn. App. 480, 146 S.W.2d 840 (1940) (same). In any event, petitioner concedes (Pet. Br. 13) that in 1853 "Congress severed the link between federal practice and state law."

to pay for an attorney" should not be "an impediment to litigation regarding basic rights and liberties." 122 Cong. Rec. S16,280 (daily ed. Sept. 22, 1976); *Sourcebook* at 63. And Representative Jordan summarized the statute as saying to potential litigants, "[y]ou are not to be deterred simply because you have to hire a lawyer." *Id.* at H12,164 (daily ed. Oct. 1, 1976); *Sourcebook* at 268.

Senator Kennedy told the Senate that the bill that became Section 1988 was not a "lawyers' relief bill." 122 Cong. Rec. S17,052 (daily ed. Sept. 29, 1976); *Sourcebook* at 200. His comments further demonstrate that Congress contemplated a traditional attorney-client relationship:

> The lawyer who undertakes to represent a client alleging a violation of the civil rights statutes covered by this bill faces significant uncertainty of payment, even where he has a strong case.
> * * *
> Even with enactment of this bill, the lawyer who undertakes to represent a client will face more uncertainty of payment than one involved

in a usual contingency fee case. His fee is contingent not only upon his success, but also upon the discretion of the judge before whom he appears.

Even if he wins his case, and the judge decides he has won a fee as well, his rate of compensation is fixed not by a grateful client, but by a disinterested judge.

Id. at S17,052; *Sourcebook* at 200-201.[16]

Petitioner's argument from the legislative history (Pet. Br. 12-18) ignores these statements and focuses instead on the status of organizational plaintiffs. It is true, as petitioner notes, that Congress enacted Section 1988 in the wake of this Court's decision in *Alyeska Pipeline Co.* v. *Wilderness Society*, *supra*, to remedy "an anomalous gap in [the] civil rights laws." S. Rep. No. 1011, *supra*, at 1. Petitioner is also correct in observing that the plaintiffs in *Alyeska* were organizations. As we have explained above, however, see pp. 17-18 *supra*, organizational plaintiffs are not the same as pro se lawyers, because organizations act only through their agents. Consequently, there is no basis for petitioner's contention that Congress, because it intended to permit organizations to recover attorney's fees, must have intended to permit pro se lawyers to recover fees as well.

[16] The hearings that resulted in Section 1988 focused on the problems of individuals who cannot afford to hire attorneys. See *Hearings on the Effect of Legal Fees on the Adequacy of Representation Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973). The problem, as defined by Senator Tunney, was that numerous legal questions were not resolved "because people cannot afford legal counsel." *Id.* at 1. "[T]he cost of securing a lawyer affects the use, availability, and quality of representation." *Id.* at 3. Senator Cook, ranking minority member on the committee, had the same understanding: "[M]any people are unable to obtain a lawyer's services." *Id.* at 5. The subcommittee's aim was "to study ways in which the lawyer can more adequately make his services available to those who now feel that legal services are beyond their reach." *Id.* at 6. Senator Tunney described the effect of fee-shifting statutes as follows: "When an attorney is able to collect fees if he prevails * * *, he can take cases on behalf of average-income citizens and vindicate their rights." *Id.* at 788. And in summing up six days of hearings, Senator Tunney said that "[e]conomics, both in terms of what consumers can afford to pay and what lawyers can afford to work for, are the nub of the issue." *Id.* at 1253.

B. Awarding Attorney's Fees To Pro Se Litigants, Including Pro Se Lawyers, Undermines the Purposes of Section 1988

Petitioner, while recognizing that fee awards to pro se non-lawyers would raise policy concerns, Pet. Br. 18 n.7, contends that awards to pro se lawyers would further the Congressional purpose to promote "full and effective enforcement of the civil rights statutes." Pet. Br. 18. In our view, drawing a distinction between pro se lawyers and pro se non-lawyers would neither further the goals of Section 1988 nor promote effective enforcement of the civil rights laws.

1. In enacting Section 1988, Congress plainly did not intend to encourage pro se litigation. Indeed, Congress had precisely the opposite goal—to enable potential plaintiffs in civil rights actions to obtain legal representation. There is no reason to think that Congress intended a different approach in the case of pro se lawyers.

"The old adage that a lawyer who represents himself has a fool for a client is rooted firmly in many, many years of experience." *Aronson* v. *HUD*, 866

F.2d at 6. See also *Faretta* v. *California*, 422 U.S. 806, 852 (1975) (Blackmun, J., dissenting). A pro se lawyer, because of his personal stake in the case, lacks professional detachment and objectivity. These are important aspects of an attorney's service to a client. "It is axiomatic that effective legal representation is dependent not only on legal expertise, but also on a detached and objective perspective." *White* v. *Arlen Realty & Dev. Corp.*, 614 F.2d at 388. Petitioner suggests (Pet. Br. 16) that lawyers for public interest organizations may be less objective than pro se lawyers. But this overlooks the difference between a lawyer who is committed to a principle or a program of reform and a lawyer who is a party to the case. Experience has shown that the first type of commitment is consistent with professional objectivity; the second is not. To be sure, civil rights plaintiffs are entitled to vigorous advocacy. But vigorous advocacy is not incompatible with the exercise of professional judgment, and objectivity is no less desirable in civil rights cases than in other cases.

Pro se litigation by lawyers also raises ethical problems. The Model Code of Professional Responsibility states that

> [t]he roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

EC 5-9 (1980). See also Model Rules of Professional Conduct Rule 3.7 (1989). Although there is authority that testimony by a pro se lawyer does not violate the rules of professional ethics, see, *e.g.*, *Borman* v. *Borman*, 378 Mass. 775, 789, 393 N.E.2d 847, 856 (1979), it is nevertheless true that a lawyer who acts as both advocate and witness undermines his

effectiveness in both roles. It is unlikely that Congress intended to encourage lawyers to engage in such a practice.[17]

2. There is little risk that denying fees to pro se litigants will inhibit the filing of meritorious civil rights cases. The decision of the court of appeals in this case places lawyers on the same footing as all other potential pro se litigants. Lawyers are at least as capable of obtaining legal representation as non-lawyers. Of course, a lawyer who litigates a case pro se may hope not only to vindicate his civil rights but to earn a fee as well. But Congress clearly intended to promote the first goal and not the second. See 122 Cong. Rec. S17,052 (daily ed. Sept. 29, 1976) (Section 1988 is not a "lawyers' relief bill.") (statement of Sen. Kennedy). A pro se lawyer's interest in obtaining a fee award may cause him to pursue marginal litigation that would not be worthwhile to any client, and may influence the pro se lawyer to reject reasonable settlement offers that would reduce or eliminate his fee. Cf. *Evans* v. *Jeff D.*, 475 U.S. 717, 735 (1986).

3. Finally, it is "not * * * seemly to treat *pro se* lawyers differently than *pro se* lay litigants." *Aronson* v. *HUD*, 866 F.2d at 6. All pro se litigants, lawyers and non-lawyers alike, presumably devote time and energy to the litigation. "It is not just law-

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[17] In addition, if a pro se lawyer is not eligible to practice in the court in which the litigation takes place, he arguably violates at least the spirit of the ethical rule that a lawyer shall not encourage the unauthorized practice of law. See Model Code DR 3-101(B) (1980) ("A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction."); Model Rule 5.5(a) (1989) ("A lawyer shall not * * * practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.")

yers whose time is 'their stock in trade'; it is everyone." *Jones* v. *Lujan*, 883 F.2d at 1036 (Silberman, J., concurring). Although pro se lawyers as a group may be more skilled than pro se non-lawyers as a group, Section 1988 limits fee awards to "prevailing parties." Thus, there is no convincing basis for arguing that prevailing pro se lawyers achieve better results than prevailing pro se non-lawyers. To allow lawyers, but not other citizens, to recover attorney's fees for pro se litigation smacks of favoritism towards the legal profession. A rule that "appear[s] to be especially solicitious for the economic welfare of lawyers" would not "enhance[] public respect for the bar or the judiciary." *Aronson*, 886 F.2d at 6.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 282081 20256